

1 CHRISTENA GEORGAS-BURNS, ESQ.  
Nevada Bar No. 14314C  
2 DAVID OLSHAN, ESQ.  
Nevada Bar No. 4126  
3 NEVADA LEGAL SERVICES, INC.  
530 S. 6<sup>th</sup> Street  
4 Las Vegas, Nevada 89101  
(702) 386-0404  
5 dolshan@nlslaw.net  
Attorneys for Plaintiff  
6  
7

8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 **OLIVER BRUCE MORRIS,**

11 **Plaintiff,**

12 **v.**

13 **MICHAEL R. POMPEO, in his official**  
14 **capacity as the Secretary of State.**

15 **Defendant.**

**Case No. 2:19-cv-00569-GMN-DJA**

**MOTION FOR SUMMARY JUDGMENT/**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES**

16 The Defendant, MICHAEL R. POMPEO [“Secretary” or “Defendant”], has admitted<sup>1</sup> to  
17 requiring Plaintiff, OLIVER BRUCE MORRIS [“Oliver”], to produce a doctor’s note and force  
18 a medical examination or undergo medical treatment before granting a male gender marker<sup>2</sup> on  
19 a passport.<sup>3</sup> Oliver, by his attorneys, hereby files his Motion for Summary Judgment pursuant  
20 to Fed. R. Civ. P. 56 because this policy violates the law.

21 \_\_\_\_\_  
22 <sup>1</sup> Defendant’s Motion to Dismiss, Motion for Summary Judgment, and Memorandum of Points  
and Authorities [“Motion”] (ECF #25) at 1.

23 <sup>2</sup> The term “gender” mirrors language in the Foreign Affairs Manual and provides more accuracy  
than “sex” because the Secretary never verifies sex, genetic indicators, or sex genitalia, but the  
gender marker on documents.

24 <sup>3</sup> Motion (Doc. #25) at 1.

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**MOTION FOR SUMMARY JUDGMENT**

Oliver wanted a passport card as an additional form of identification and to travel to Mexico, and applied for a passport on October 13, 2018. Born in Modesto, CA and designated female at birth, Oliver has been living as a male since January 2015.<sup>4</sup> Oliver's passport application was denied.<sup>5</sup>

Oliver now challenges the Secretary's policy of requiring medical certification or a doctor's note for any passport applicant who "indicates a gender on the 'sex' line on the passport application with information different from the one reflected on some or all of the submitted citizenship and/or identity evidence, including a prior passport."<sup>6</sup> The doctor's note must verify that the applicant "has had appropriate clinical treatment for gender transition to the new gender of either male or female."<sup>7</sup> The Secretary's policy of requiring medical treatment before Oliver can obtain a passport reflecting his gender is a violation of Fifth Amendment of the U.S. Constitution, which protects the right to refuse medical treatment and prohibits discrimination based on sex.<sup>8</sup>

This Complaint/Petition for Judicial Review presents the Court with two possible standards: (1) Summary Judgment and the standards under Fed. R. Civ. P. 56 or (2) a Petition for Judicial Review under the APA. Oliver will address both standards below, demonstrate why he is entitled to judgment as a matter of law, and show that the Secretary's decision to deny a passport according to the Policy is arbitrary, capricious, and contrary to law.

---

<sup>4</sup> First Amended Complaint ["FAC"] (ECF #13) at ¶15.

<sup>5</sup> AR at 28-29.

<sup>6</sup> 8 FAM 403.3-1(a).

<sup>7</sup> 8 FAM 403.3-2(B)(d)(5). This doctor's note requirement will be referred to as the "Policy" throughout this Motion/Memo.

<sup>8</sup> See *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997); see also *Bolling v. Sharpe*, 347 U.S. 497 (1954) ("discrimination may be so unjustifiable as to be violative of due process").

## STATEMENT OF FACTS

On October 9, 2018, Oliver submitted an application for a U.S. passport card to the Secretary.<sup>9</sup> Oliver listed his gender as male and included a California birth certificate in the name “Chanesse Olivia Morris” with the gender listed as female.<sup>10</sup> Oliver obtained a name change order that legally changed his name to Oliver Bruce Morris and a Nevada driver’s license that listed Oliver’s gender as male.<sup>11</sup>

The Secretary denied Oliver’s passport card request based on the Policy and, on October 24, 2018, sent a letter to Oliver indicating that “[i]n order to issue you a passport card reflecting a sex different from the one on some or all of your citizenship and/or identity evidence, please send us a signed original statement on office letterhead from your attending medical physician” indicating “that you have had appropriate clinical treatment for transition to the new sex.”<sup>12</sup>

Oliver did not respond and, on January 24, 2019, the Secretary sent the identical letter titled “FINAL REQUEST” indicating that the application may be denied unless Oliver provided the requested certification within ninety days.<sup>13</sup> At the time, Oliver was not seeing a doctor. He could not supply the doctor’s note without first buying health insurance and then finding a doctor and undergoing medical treatment other than the hormone treatment that Oliver was pursuing from a Nurse Practitioner.<sup>14</sup> Oliver’s counsel sent a letter to the Secretary on February 22, 2019, indicating that Oliver would not supply the requested certification because Oliver “cannot afford any gender transition treatment right now” and because “he does

---

<sup>9</sup> AR (ECF #20) at 1-2.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* 3, 5.

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 20.

1 not need any medical intervention for a gender transition.”<sup>15</sup> Oliver’s letter also indicated that  
 2 the Secretary’s Policy violated the Constitution and that Oliver wanted a hearing to present his  
 3 case.<sup>16</sup>

4 On March 26, 2019, the Secretary sent the same letter to Oliver, denying his passport  
 5 application and requesting the doctor’s note within ninety days.<sup>17</sup> On April 5, 2019, Oliver  
 6 initiated the complaint with this Court.<sup>18</sup> On May 21, 2019, the Secretary sent Oliver a letter  
 7 formally denying the passport application pursuant to 22 C.F.R. § 51.23.<sup>19</sup>

#### 8 STATUTORY AND REGULATORY AUTHORITY

9 A passport is “a travel document regardless of format issued under the authority of the  
 10 Secretary of State attesting to the identity and nationality of the bearer.”<sup>20</sup> It can be used as a  
 11 travel document and a diplomatic “letter of introduction in which the issuing sovereign vouches  
 12 for the bearer and requests other sovereigns to aid the bearer.”<sup>21</sup> The Passport Act “centralized  
 13 passport authority in the Federal Government<sup>22</sup> and gave the Secretary of State authority to  
 14 “grant and issue passports . . . under such rules as the President shall designate and prescribe  
 15 for and on behalf of the United States.”<sup>23</sup> The President delegated this authority to prescribe  
 16 rules for the issuance of passports to the Secretary of State.<sup>24</sup> As such, the Secretary of State  
 17

---

18 <sup>15</sup> AR at 11.

19 <sup>16</sup> *Id.*

20 <sup>17</sup> *Id.* at 12-13.

21 <sup>18</sup> *Id.* at 14.

22 <sup>19</sup> *Id.* at 28–29.

23 <sup>20</sup> 22 C.F.R. § 51.1. The passport also provides proof of citizenship for employment and Real ID  
 24 purposes. See I-9 Form at page 3 <https://www.uscis.gov/i-9> and  
<https://dmv.nv.com/duplicate.htm#realh3> for Nevada’s Real ID requirements.

<sup>21</sup> *Haig v. Agee*, 453 U.S. 280, 292 (1981).

<sup>22</sup> *Agee*, 453 U.S. at 294.

<sup>23</sup> 22 U.S.C. § 211a.

<sup>24</sup> Exec. Order No. 11295, 31 Fed. Reg. 10, 603 (Aug. 9, 1966).

1 promulgated regulations governing passports and their content.<sup>25</sup> In order to obtain a passport,  
2 “the applicant has the burden of establishing his or her identity . . . by the submission of a  
3 previous passport, other state, local, or federal government officially issued identification with  
4 photograph, or other identifying evidence which may include an affidavit of an identifying  
5 witness.”<sup>26</sup> In addition, “[t]he Department may require such additional evidence of identity as it  
6 deems necessary.”<sup>27</sup>

7       The Secretary promulgated a new policy in 2010 specifically targeting applicants who  
8 seek a passport with a sex designation that differs from that listed on the government  
9 identification document submitted as part of the passport application.<sup>28</sup> According to this new  
10 policy, in order for an applicant who is transgender to obtain a passport with a sex designation  
11 different from the one reflected on the submitted citizenship or identity evidence, the applicant  
12 must present “certification, done under penalty of perjury, from the attending medical physician  
13 . . . [demonstrating] that the applicant has had appropriate clinical treatment for gender  
14 transition” or “is in the process of gender transition.”<sup>29</sup> While this policy eliminated the  
15 previous requirement that an applicant undergo sex reassignment surgery in order to obtain a  
16 passport with a new sex designation, it established that the applicant must submit medical  
17 documentation of their transition in the form of the physician’s certification.<sup>30</sup>

18       Because of this policy, in addition to furnishing “acceptable Identification Document(s)  
19 (IDs) in the new gender, and name, if applicable,”<sup>31</sup> the applicant must present “a signed,  
20 original certification or statement, on office letterhead, from a licensed physician who has

21 <sup>25</sup> See 22 C.F.R. §§ 51.1–51.74.

22 <sup>26</sup> 22 C.F.R. § 51.23(a)–(b).

23 <sup>27</sup> *Id.* at § 51.23(c).

24 <sup>28</sup> See A.R. 33–41; *see also Id.* at 42.

<sup>29</sup> Action Memo for Assistant Secretary Jacobs (May 14, 2010), AR at 31; *see also* AR at 33–41.

<sup>30</sup> AR at 34.

<sup>31</sup> 8 FAM 403.3-2(A)(b), AR at 107.

1 treated the applicant for her/his gender-related care or reviewed and evaluated the gender-  
 2 related medical history of the applicant.”<sup>32</sup> In order for the certification to be valid, it must  
 3 include the physician’s full name, medical license or certificate number, address, and telephone  
 4 number,<sup>33</sup> and contain language stating that (1) the physician “has treated the applicant or has  
 5 reviewed and evaluated the medical history of the applicant and that she/he has a doctor/patient  
 6 relationship with the applicant”; (2) “the applicant has had appropriate clinical treatment for  
 7 gender transition to the new gender of either male or female”; and (3) the certification is  
 8 submitted under penalty of perjury.<sup>34</sup> By requiring this additional medical evaluation and  
 9 certification for applicants who are transgender, the Secretary has established different  
 10 standards for people who are transgender.

#### 11 STANDARD OF REVIEW UNDER RULE OF CIVIL PROCEDURE 56

12 Fed. R. Civ. P. 56 and LR 56-1 allow Oliver to file a motion requesting summary  
 13 judgment. Under Fed. R. Civ. P. 56(a), Oliver must show that there is no genuine issue of  
 14 material fact and that he is entitled to judgment as a matter of law.<sup>35</sup> A fact is material only if it  
 15 is one that “under the governing substantive law . . . could affect the outcome of the case.”<sup>36</sup> A  
 16 factual issue is genuine if “a jury could reasonably find in the nonmovant’s favor. . . .”<sup>37</sup>

17 Oliver has the initial burden of establishing that no genuine issue of material fact exists  
 18 or that a material fact essential to the non-moving party’s claim is absent.<sup>38</sup> Once he has met his  
 19

20 

---

<sup>32</sup> 8 FAM 403.32(B)(a), AR at 108; *see also* 8 FAM 403.3-8, AR at 114.

21 <sup>33</sup> 8 FAM 403.3-2(B)(d)(1)–(3), AR at 108–09.

22 <sup>34</sup> *See* 8 FAM 403.3-2(B)(d)(4)–(6), AR at 109.

23 <sup>35</sup> Fed. R. Civ. P. 56(a).

24 <sup>36</sup> *Caneva v. Sun Communities Operating Ltd. P’Ship (In re Caneva)*, 550 F.3d 755, 760 (9<sup>th</sup> Cir. 2008).

<sup>37</sup> *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 730 (9<sup>th</sup> Cir. 2012).

<sup>38</sup> *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

burden, the Secretary must establish that there is a genuine issue of material fact.<sup>39</sup> The Secretary cannot avoid summary judgment by relying solely on unsupported, conclusory allegations.<sup>40</sup> The Court views the evidence and reasonable inferences in the light most favorable to the Secretary.<sup>41</sup> If the evidence of the Secretary is merely colorable or is not significantly probative, summary judgment may be granted.<sup>42</sup>

#### STANDARD OF REVIEW UNDER APA

Under the Administrative Procedure Act (APA), a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .”<sup>43</sup> “To have not acted in an arbitrary and capricious manner, the agency must present a ‘rational connection between the facts found and the conclusions made.’”<sup>44</sup> These standards require the court to engage in a substantial inquiry and a “probing, in-depth review.”<sup>45</sup>

A court reviewing agency action under the arbitrary and capricious standard must ascertain whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>46</sup> Agency action should be set aside “if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision

<sup>39</sup> *Fairbank v. Johnson*, 212 F.3d 528, 531 (9<sup>th</sup> Cir. 2000).

<sup>40</sup> *Taylor v. List*, 880 F.2d 1040, 1045 (9<sup>th</sup> Cir. 1989).

<sup>41</sup> *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9<sup>th</sup> Cir. 2008).

<sup>42</sup> *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9<sup>th</sup> Cir. 1995).

<sup>43</sup> 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971); *Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9<sup>th</sup> Cir. 2007).

<sup>44</sup> *Brong*, 492 F.3d at 1125 (internal citation omitted).

<sup>45</sup> *Citizens to Preserve Overton Park*, 401 U.S. at 415-16.

<sup>46</sup> *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9<sup>th</sup> Cir. 2003).

1 that runs counter to the evidence before the agency, or is so implausible that it could not be  
 2 ascribed to a difference in view or the product of agency expertise.”<sup>47</sup> The ‘arbitrary and  
 3 capricious’ standard requires an agency’s action to be supported by the facts in the record.<sup>48</sup>  
 4 Questions of law, including constitutional claims, require *de novo* review.<sup>49</sup>

## 5 ARGUMENT

### 6 I. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE POLICY 7 VIOLATES THE U.S. CONSTITUTION AND THE SECRETARY HAS NOT 8 ALLEGED FACTS OR A LEGAL ARGUMENT TO JUSTIFY IT.

9 The Fifth Amendment in the U.S. Constitution protects a person’s fundamental rights,  
 10 including the right to refuse medical treatment,<sup>50</sup> and prohibits the government from  
 11 discriminating against a person based on sex.<sup>51</sup> If a government action violates a person’s  
 12 fundamental right to refuse medical treatment, then the government must overcome strict  
 13 scrutiny.<sup>52</sup> In addition, if a government action discriminates against a person based on sex, the  
 14 government must satisfy intermediate scrutiny.<sup>53</sup> Here, the Secretary’s Policy unconstitutionally  
 15 violated Oliver’s fundamental right to refuse medical treatment and discriminated against Oliver  
 16 based on sex and the Secretary has not alleged facts or a legal argument sufficient to justify the  
 17 policy. Therefore, summary judgment should be granted.

#### 18 **A. The Secretary’s Policy of Requiring Medical Treatment Before Oliver Can Obtain 19 a Passport Reflecting His Gender is a Violation Of His Fundamental Right To 20 Refuse Medical Treatment.**

21 <sup>47</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

22 <sup>48</sup> *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9<sup>th</sup> Cir. 2001).

23 <sup>49</sup> *Partridge v. Reich*, 141 F.3d 920, 923 (9<sup>th</sup> Cir. 1998); *Custer County Action Ass’n v. Garvey*,  
 24 256 F.3d 1024, 1030 (10<sup>th</sup> Cir. 2001).

<sup>50</sup> *Wash. v. Glucksberg*, 521 U.S. 702, 720; *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261,  
 279 (1990).

<sup>51</sup> *Reed v. Reed*, 404 U.S. 71, 75 (1971).

<sup>52</sup> *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

<sup>53</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).



1           The Due Process Clause in the Fifth Amendment of the United States Constitution  
 2 provides that no person shall “be deprived of life, liberty, or property, without due process of  
 3 law.”<sup>54</sup> In addition, the Fifth Amendment Due Process Clause “forbids the government to  
 4 infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless  
 5 the infringement is narrowly tailored to serve a compelling state interest.”<sup>55</sup> In this case, the  
 6 Secretary’s Policy infringes on Oliver’s fundamental liberty interest in the right to refuse  
 7 medical treatment and the Secretary has failed to alleged a compelling interest narrowly tailored  
 8 to serve the interest, therefore the Policy is a violation of the Fifth Amendment of the U.S.  
 9 Constitution.

10           *i. The right to refuse medical treatment is a fundamental liberty interest protected by the*  
 11 *Due Process Clause in the Fifth Amendment of the U.S. Constitution.*

12           It is well-established that the right to refuse medical treatment is a fundamental liberty  
 13 interest protected by the Constitution.<sup>56</sup> Since its inception, our Constitution has mandated that  
 14 the government cannot force an individual to undergo a medical examination,<sup>57</sup> a blood test,<sup>58</sup> a  
 15 pat down by a police officer,<sup>59</sup> or medical treatment.<sup>60</sup> This right to refuse medical treatment is  
 16 enshrined in the Due Process Clause of our Constitution;

18 <sup>54</sup> U.S. Const. Amend. V.

19 <sup>55</sup> *Flores*, 507 U.S. at 301-302.

20 <sup>56</sup> *Glucksberg*, 521 U.S. at 720 (stating the Supreme Court has “also assumed, and strongly  
 21 suggested, that the Due Process Clause protects the traditional right to refuse unwanted  
 22 lifesaving medical treatment.”); *see also Cruzan*, 497 U.S. at 279 (a competent person has a  
 “constitutionally protected right to refuse lifesaving hydration and nutrition.”); *Id.* 497 U.S. at  
 287 (concurring) (“the liberty guaranteed by the Due Process Clause must protect, if it protects  
 anything, an individual’s deeply personal decision to reject medical treatment, including the  
 artificial delivery of food and water.”).

23 <sup>57</sup> *Union P.R. Co. v. Botsford*, 141 U.S. 250, 251-55 (1891) (citation omitted).

24 <sup>58</sup> *Fong Sik Leung v. Dulles*, 226 F.2d 74 (9<sup>th</sup> Cir. 1955).

<sup>59</sup> *Terry v. Ohio*, 392 U.S. 1 (1968)

<sup>60</sup> *McKay v. Bergstedt*, 801 P.2d 617, 622 (Nev. 1990).

1 [N]o right is held more sacred, or is more carefully guarded, by the common law,  
 2 than the right of every individual to the possession and control of his own person,  
 3 free from all restraint or interference of others, unless by clear and unquestionable  
 4 authority of law.<sup>61</sup>

5 The right to bodily integrity and the right to be free from unwanted touching remain  
 6 cornerstones of due process protection.<sup>62</sup> This is evident in the general requirement for  
 7 informed consent to medical treatment and the fact that an individual “generally possesses the  
 8 right not to consent, that is, to refuse treatment.”<sup>63</sup> Thus, “a competent person has a  
 9 constitutionally protected liberty interest in refusing unwanted medical treatment. . . .”<sup>64</sup> As the  
 10 Supreme Court in *Washington v. Glucksberg* highlighted, “given the common-law rule that  
 11 forced medication was a battery, and the long legal tradition protecting the decision to refuse  
 12 unwanted medical treatment, our assumption [that there is a right to refuse unwanted medical  
 13 treatment] was entirely consistent with this Nation's history and constitutional traditions.”<sup>65</sup>

14 This interest in freedom from unwanted medical treatment specific to people who are  
 15 transgender is reflected in multiple state laws, which show a move toward self-identification  
 16 instead of medical proof to change one’s gender on identification forms, like a birth certificate  
 17 or a driver’s license. Specifically, Nevada, along with 12 states and the District of Columbia,<sup>66</sup>  
 18 allow for non-binary or “X” designations on a driver’s license, reflecting advancement toward

19 <sup>61</sup> *Botsford*, 141 U.S. at 251.

20 <sup>62</sup> *Rochin v. California*, 342 U.S. 165, 173-74 (1952); *Glucksberg*, 521 U.S. at 720.

21 <sup>63</sup> *Cruzan*, 497 U.S. 261 at 270; see also *Glucksberg*, 521 U.S. at 720 (stating the Supreme Court  
 22 has “also assumed, and strongly suggested, that the Due Process Clause protects the traditional  
 23 right to refuse unwanted lifesaving medical treatment.”).

24 <sup>64</sup> *Cruzan*, 497 U.S. at 278.

<sup>65</sup> *Glucksberg*, 521 U.S. at 725.

<sup>66</sup> <https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001/>; see also *How Trans-Friendly Is The Driver’s License Gender Change Policy In Your State?*, National Center for Transgender Equality, <https://transequality.org/sites/default/files/docs/id/Drivers%20License%20Grades%20Nov%202019.docx.pdf>.

1 self-identification.<sup>67</sup> Nine states and New York City do not require a medical provider signature  
 2 in order to change the sex designation on a birth certificate.<sup>68</sup> The Nation's history and  
 3 traditions have not changed simply because a person is transgender.

4 Moreover, the Policy assumes medical treatment is necessary in *every* transgender case  
 5 and that *every* transgender applicant suffers from a condition called gender dysphoria.  
 6 According to the Secretary, the Policy:

7 Articulate[s] professional consensus about the psychiatric, psychological,  
 8 medical, and surgical management of gender identity disorders. . . . Accordingly,  
 9 the Department [Secretary] determined that an applicant's physician would be a  
 reliable source to verify the applicant's sex designation. . . .<sup>69</sup>

10 The focus is on gender identity disorders and, because this malady is assumed about *every*  
 11 transgender applicant, the discriminatory nature of this Policy is readily apparent. Requiring  
 12 every transgender applicant to produce a doctor's note places an additional burden on a discrete  
 13 group based on sex.

14 Understanding a transgender person begins with no longer viewing gender  
 15 nonconformity as a sickness or disease of the mind or body.<sup>70</sup> Being transgender, or a gender  
 16 that differs from birth gender, is not a malady. The Diagnostic and Statistical Manual (DSM) of  
 17 the American Psychiatric Association defines "gender dysphoria" as:

18 the distress that may accompany the incongruence between one's experienced or  
 19 expressed gender and one's assigned gender. Although not all individuals will

20 <sup>67</sup> Currently, the Secretary does not have a policy to address identity documents without a gender  
 marker or a gender marker that does not fit the binary.

21 <sup>68</sup> *Summary of State Birth Certificate Gender Change Laws*, National Center for Transgender  
 Equality,  
 22 <https://transequality.org/sites/default/files/docs/id/Summary%20of%20State%20Birth%20Certificate%20Laws%20October%202019.pdf>.

23 <sup>69</sup> Motion at 4.

24 <sup>70</sup> *The Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* ("SOC"), World Professional Association For Transgender Health  
 Version 7 at 4-5 (2011).

1 experience distress as a result of such incongruence, many are distressed if the  
 2 desired physical interventions by means of hormones and/or surgery are not  
 3 available. The current term is more descriptive than the previous DSM-IV term  
*gender identity disorder* and focuses on dysphoria as the clinical problem, not  
 identity per se.<sup>71</sup>

4 DSM-5 emphasizes the primacy of self-identification, eschewing the pejorative label of  
 5 “dysphoria” to a gender transition decision and only applying this label to those decisions that  
 6 involve distress.<sup>72</sup> More importantly, the focus is on transgender self-identification, *vis-a-vis*  
 7 the rejection of birth assignment of gender and the use of “gender identity” or the individual’s  
 8 identification as male, female, or “some category other than male or female.”<sup>73</sup> In other words,  
 9 changing gender only requires medical treatment when accompanied by anxiety or stress.

10 The latest version of the Standards of Care for the Health of Transsexual, Transgender,  
 11 and Gender-Nonconforming People, Version 7 (SOC), published in 2011, describes the most  
 12 current understanding of the transgender experience. The SOC is issued by a multidisciplinary  
 13 professional association (the World Professional Association for Transgender Health or  
 14 WPATH). The SOC emphasizes the common medical understanding, that “being transsexual,  
 15 transgender, or gender nonconforming is a matter of diversity, not pathology.”<sup>74</sup> WPATH also  
 16 urges the “de-psychopathologization” of gender by not viewing gender changes as a mental  
 17 illness.

18 The expression of gender characteristics, including identities, that are not  
 19 stereotypically associated with one’s assigned sex at birth is a common and  
 20 culturally diverse human phenomenon [that] should not be judged as inherently  
 pathological or negative.<sup>75</sup>

---

21 <sup>71</sup> DSM 5 (American Psychiatric Association, 2013) at 451.

22 <sup>72</sup> DSM-5 at 451.

23 <sup>73</sup> *Id.*

24 <sup>74</sup> SOC at 4.

<sup>75</sup> The World Professional Association for Transgender Health, Policy Statement of May 26,  
 2010 at 1.

As a result, medical experts know that a transgender or a gender nonconforming person does not automatically have any medical issue requiring a doctor. As the APA describes:

Gender dysphoria is not the same as gender nonconformity, which refers to behaviors not matching the gender norms or stereotypes of the gender assigned at birth. Examples of gender nonconformity (also referred to as gender expansiveness or gender creativity) include girls behaving and dressing in ways more socially expected of boys or occasional cross-dressing in adult men. Gender nonconformity is not a mental disorder. Gender dysphoria is also not the same as being gay/lesbian.<sup>76</sup>

Adopting behavior that is not stereotypically associated with one's birth gender does not render you infirm: it is a choice, not a sickness.

Some people who are transgender suffer from "gender dysphoria,"<sup>77</sup> but it is simply wrong to assume *all* people who are transgender suffer from this problem.<sup>78</sup> DSM-5 emphasizes that not every transgender individual "experience[s] distress" requiring medical attention.<sup>79</sup> The stigma attached to gender nonconformity is "not inherent to being transsexual, transgender, or gender nonconforming."<sup>80</sup> Often, gender dysphoria and minority stress are linked, so that any mental distress caused by gender nonconformity is attributable to society and not the person who is transgender.<sup>81</sup> People who are transgender face "even greater levels of societal discrimination and marginalization" than gay or lesbian persons.<sup>82</sup> That some people who are transgender and gender nonconforming experience gender dysphoria does not mean *all* experience it because, "to every experience, each of us brings our own schemas, attitudes, and

<sup>76</sup> <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>

<sup>77</sup> See Katherine Schreiber, "Why Transgender People Experience More Mental Health Issues," *Psychological Today* (December 6, 2016) (where about 18% of transgender people suffer from "some iteration of an anxiety disorder").

<sup>78</sup> *Doe v. Shanahan*, 917 F.3d 694, 696 (D.C. Cir. 2019).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Hendricks, M. L., & Testa, R. J., "A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the Minority Stress Model." *Professional Psychology: Research and Practice*, 43(5) (2012) at 460-467.

<sup>82</sup> *Norsworthy v. Beard*, 87 F.Supp. 3d 1104, 1119 (N.D. Cal. 2015).

1 expectations.”<sup>83</sup> The individual retains the right to identify and express a gender that differs  
2 from the birth gender and should have that right without fear of being labeled ill. There is  
3 nothing wrong physically or mentally with an individual who claims a gender other than birth  
4 gender and, even if there may be a gender identity disorder, this problem may result from  
5 societal discrimination and minority stress, problems exacerbated by the Secretary’s bias  
6 against transgender applicants.

7 Further, the argument that this Policy does not actually require medical treatment for  
8 every applicant who is transgender but only certification of a gender transition is ludicrous.  
9 According to the Foreign Affairs Manual, the doctor must verify that the applicant “has had  
10 appropriate clinical treatment for gender transition to the new gender of either male or  
11 female.”<sup>84</sup> The Secretary tries to minimize the harsh requirement of the Policy by stating that  
12 the Secretary “does not require any particular treatment, as long as the certifying physician  
13 determines that the applicant has received ‘appropriate clinical treatment.’”<sup>85</sup> The Policy does  
14 not require *specific* medical treatment, but it requires a person who is transgender to subject  
15 themselves to a medical evaluation because they are transgender and only by a doctor of  
16 osteopathy (D.O.) or a medical doctor (M.D.).<sup>86</sup> The Policy requires a person who is  
17 transgender to seek treatment from a doctor, something usually only done when the person  
18 suspects there is something medically wrong, regardless of whether the person is experiencing  
19 gender dysphoria.

20 Not only does this Policy require all people who are transgender who want a passport to  
21 seek medical treatment, it wrongfully assumes all people who are transgender need medical

---

22 <sup>83</sup> Dr. Rajiv Jhangiani and Dr. Hammond Tarry, Principles of Social Psychology, 311 (1<sup>st</sup> Int’l  
ed. 2011).

23 <sup>84</sup> 8 FAM 403.3-2(B)(d)(5).

24 <sup>85</sup> Motion at 11.

<sup>86</sup> 8 FAM 403.3-2(B)(b).

1 treatment because they are transgender. The Secretary tries to minimize the harsh presumption  
2 that all transgender applicants suffer from gender dysphoria by pointing out “medical  
3 professionals play a prominent role in the lives of people with gender identity disorders.”<sup>87</sup>  
4 Requiring a doctor’s note for *all* gender marker changes on a passport ignores the reality of the  
5 transgender experience and contradicts medical evidence.

6       There is nothing wrong with the body or mind of Oliver. Oliver does not need *any*  
7 medical treatment to be transgender and the vast majority of medical experts agree. Despite  
8 Oliver not needing medical treatment and not having a doctor at the time of application, the  
9 Secretary required Oliver to undergo medical evaluation and treatment in order to obtain a  
10 passport. The doctor is free to recommend any treatment, yet Oliver has no freedom to refuse  
11 this medical treatment. While a good doctor follows Oliver’s needs and wants, even if it means  
12 no medical treatment, the very requirement of having a medical examination is a violation of  
13 Oliver’s fundamental right to refuse medical treatment protected by the Due Process Clause of  
14 the Fifth Amendment.

15       By subjecting a person to a doctor to certify gender transition, a person is being forced to  
16 consent to an invasion of the body, one of a person’s most private aspects of life, even if no  
17 treatment is ultimately ordered by the doctor. A doctor is not a gender umpire, deciding who is  
18 male or female, and medical care does not define a person’s gender. As a result, this  
19 requirement to seek medical treatment and provide proof of “appropriate clinical treatment for  
20 gender transition” is a violation of Oliver’s fundamental liberty interest to refuse medical  
21 treatment and can only be upheld if this court finds there is a compelling government interest  
22 that outweighs Oliver’s interest.

---

23  
24 <sup>87</sup> Motion at 11.

1        *ii. The Secretary has not alleged a compelling government interest or adequately supported*  
 2        *the Policy as narrowly tailored to protect Oliver’s interest in refusing medical*  
       *treatment.*

3        Because the right to refuse medical treatment is a fundamental liberty interest protected  
 4 by the Fifth Amendment, the government must prove that there is a compelling interest and the  
 5 means of serving that interest is narrowly tailored.<sup>88</sup> In this case, the Secretary stated the goal of  
 6 the Policy is “to protect the integrity of the U.S. passport as proof of U.S. citizenship/non-  
 7 citizen U.S. nationality and identity at home and abroad.”<sup>89</sup> In an attempt to elevate this  
 8 interest, the Secretary claims “[i]ssuing passports that accurately state the bearer’s identity is a  
 9 government interest of paramount importance.”<sup>90</sup> Therefore, the court must weigh Oliver’s  
 10 fundamental interest in freedom from unwanted medical treatment against the government’s  
 11 interest in accurate identity based on gender,<sup>91</sup> determine whether the government has a  
 12 compelling interest for the Policy that outweighs Oliver’s interest and, if so, determine the  
 13 Policy is narrowly tailored. In this case, the Secretary has not adequately met its burden to  
 14 justify the Policy with a compelling government interest or demonstrate that the Policy is  
 15 narrowly tailored to meet its interest, therefore the Policy is unconstitutional and summary  
 16 judgment is appropriate as a matter of law.

17        The Secretary has not demonstrated a compelling interest in requiring applicants who  
 18 are transgender to undergo medical treatment and receive doctor certification of gender because  
 19 the interest alleged by the Secretary in accurate identification of gender is undermined. The  
 20 Secretary establishes identity for passports using multiple factors,<sup>92</sup> therefore gender is not a  
 21 threshold factor. In addition, the Policy dismisses the supported idea that a binary gender

---

22 <sup>88</sup> *Flores*, 507 U.S. at 301.

23 <sup>89</sup> Motion at 14 (citing 8 FAM 101.1(f)(2)) (internal quotations omitted).

24 <sup>90</sup> *Id.* at 20.

<sup>91</sup> *Cruzan*, 497 U.S. at 279.

<sup>92</sup> See <https://eforms.state.gov/Forms/ds11.pdf>.



1 certified by a doctor is the only accurate gender of a person. Perpetuating the idea that the  
2 gender assigned at birth, without medical treatment, is the accurate gender ignores the reality  
3 that society is not a binary system and promotes inaccurate information on identifying  
4 documents. Nevertheless, if accurate identification of gender is a compelling interest, the  
5 Policy is not narrowly tailored to serve the interest because gender, verified by a doctor, is not  
6 the only or least restrictive means to serve that interest.

7 Federal law requires the Secretary to ensure a passport contains truthful and accurate  
8 information.<sup>93</sup> The Secretary's Passport Application Form (DS-11) requires a recent picture  
9 along with name, sex (male or female), date of birth, place of birth, Social Security number,  
10 address, name of parents, date of birth and place of birth of parents, occupation, name of  
11 employer, height, weight, eye color, and emergency contact information.<sup>94</sup> Identity can be  
12 established through this exhaustive, fifteen item list without resorting to gender. If the  
13 Secretary is not satisfied with the information and documentation provided, identity can also be  
14 established with an "identifying witness."<sup>95</sup> The Secretary previously stated that "sex  
15 designation . . . help[s] identify the bearer . . . and ensure[s] that the passport remains reliable  
16 proof of identification. . . ."<sup>96</sup> Despite this, the Secretary has not alleged anything more to  
17 support why accurate identification of sex designation is required for a passport to be accurate  
18 when multiple other factors can be used to sufficiently verify identity.

19 Here, the Secretary ignores the additional identifying factors required on the DS-11 and  
20 the less invasive alternative ways to prove identity and attempts to manufacture the gender  
21 designation as a threshold identification factor to elevate the need for the Policy to make the

---

22 <sup>93</sup> 22 U.S.C. §213.

23 <sup>94</sup> <https://eforms.state.gov/Forms/ds11.pdf>

24 <sup>95</sup> 22 C.F.R. § 51.23(b)

<sup>96</sup> Motion at 19-20.

1 passport an accurate identifying document. However, simply because the Secretary states  
2 sex/gender designation is paramount to accurate identification does not make the argument  
3 compelling. As a result, accuracy and identity in gender/sex designation is not a compelling  
4 interest.

5       What the Secretary fails to acknowledge and the Policy ignores that if Oliver presents as  
6 male, then accuracy is diminished when Oliver holds a passport with a female gender marker.  
7 As indicated in the Amended Complaint, Oliver presents as a male.<sup>97</sup> His driver's license  
8 indicates male.<sup>98</sup> Oliver cannot produce a doctor's note but the passport of Oliver must contain  
9 truthful and accurate information,<sup>99</sup> so his passport will have a female gender marker. Having a  
10 gender marker on a passport that does not reflect the bearer's gender does not add to accuracy,  
11 it diminishes it. Having a doctor divine the gender of a patient does not add to accuracy because  
12 fitting a transgender person into a binary model is not always accurate. Therefore, not only  
13 does the Secretary lack a rational interest for the Policy, the Secretary's reliance on a doctor's  
14 note at all lacks support among health professionals. Consequently, the Secretary does not meet  
15 the burden required for its interest in accuracy in gender designation to be a compelling interest  
16 and the Policy is an unconstitutional violation of Oliver's fundamental right to refuse medical  
17 treatment.

18       Even if accuracy in gender/sex designation is found to be a compelling interest, the  
19 lengthy list of additional identifying facts required by the application and the alternate means of  
20 proving identity undermines the necessity for gender to be doctor certified. The Secretary does  
21 not have to rely solely on gender to identify a person. The Secretary may use a number of other  
22 factors required by the passport application and, if not satisfied that the applicant can be

---

23 <sup>97</sup> FAC (Doc. #13) at ¶ 5.

24 <sup>98</sup> *Id.* at 4, para. 16.

<sup>99</sup> 22 U.S.C. § 213.

identified, the Secretary has other means to confirm identity, as stated in 22 C.F.R. §51.23(b). The unnecessarily invasive nature of the Policy when identity can be confirmed through other means yields a too broad Policy that fails to meet strict scrutiny.

**B. The Secretary’s Policy Violates the Equal Protection Clause of the Fifth Amendment in the U.S. Constitution**

The Equal Protection Clause of the Fifth Amendment prohibits the government from discriminating based on sex.<sup>100</sup> This protection includes discrimination because a person is transgender.<sup>101</sup> As the U.S. District Court for the District of Idaho states, “to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.”<sup>102</sup> A government policy that “on its face treats transgender persons differently than other persons” requires “more than rational basis but less than strict scrutiny. . . .”<sup>103</sup> As a result, only if the government proves the “classifications by gender [ ] serve important governmental objectives and [ ] [are] substantially related to achievement of those objectives,” will a government action withstand intermediate scrutiny and be found constitutional.<sup>104</sup> Because the Policy, facially and as-applied, discriminates against Oliver because he is transgender and the government has not asserted a substantial government interest or demonstrated the Policy is substantially related to serving that interest, summary judgment should be granted.

<sup>100</sup> *Reed*, 404 U.S. at 75 (1971)

<sup>101</sup> *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9<sup>th</sup> Cir. 2019).

<sup>102</sup> *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144 (D. Idaho 2018)

<sup>103</sup> *Karnoski*, 926 F.3d at 1201.

<sup>104</sup> *Craig*, 429 U.S. at 197 (1976)

1           *i. The Policy discriminates against Oliver based on sex.*

2           Equal protection prohibits unequal treatment based on sex. A government action may be  
 3 found unconstitutional if the government rule discriminates on its face or as-applied. In  
 4 *Karnoski v. Trump*, the Plaintiffs were people who are transgender and active duty military or  
 5 who would like to join the military.<sup>105</sup> Specifically, the named plaintiff, Ryan Karnoski, aspired  
 6 to join the military but was prevented from doing so by the government action which prohibited  
 7 people who are transgender from joining the military.<sup>106</sup> The government action established  
 8 specifically that “[t]ransgender persons with a history or diagnosis of gender dysphoria are  
 9 disqualified from military service, except under [certain] limited circumstances.”<sup>107</sup> More  
 10 broadly, it stated that “[t]ransgender persons who require or have undergone gender transition  
 11 are disqualified from military service,” and “[t]ransgender persons without a history or  
 12 diagnosis of gender dysphoria . . . may serve . . . in their biological sex.”<sup>108</sup> The Ninth Circuit  
 13 concluded the policy was discriminatory on its face because it “treats transgender persons  
 14 differently than other persons.”<sup>109</sup>

15           In the same way, the Policy here treats people who are transgender different than others.  
 16 By requiring doctor certification of “the appropriate transgender treatment,” it singles out  
 17 transgender passport applicants. The requirement to seek medical certification of gender is not  
 18 imposed on cisgender applicants to verify their gender. As the Secretary states, it  
 19 “particularizes this policy for the case in which the applicant seeks a passport reflecting the sex  
 20 component that is not established by his birth documentation.”<sup>110</sup> Other gender issues unrelated

21           

---

<sup>105</sup> *Karnoski*, 926 F.3d at 1186.

22           <sup>106</sup> *Id.*, 926 F.3d at 1189-90.

23           <sup>107</sup> *Id.*, 926 F.3d at 1201.

24           <sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Motion at 13

1 to gender transition, like a mistake on birth certificate, can be corrected without a doctor’s  
2 note.<sup>111</sup>

3 The Secretary created the Policy for transgender persons only. Therefore, the Secretary  
4 must allege an important government interest and that the Policy is substantially related to that  
5 interest to overcome intermediate scrutiny.

6 ii. *The Secretary has failed to alleged an important government interest or that the*  
7 *Policy is substantially related to serving that interest.*

8 Not only does Secretary lack a rational interest for the Policy, the Secretary’s reliance on  
9 a doctor’s note lacks support among health professionals. The intermediate standard requires the  
10 Policy to “significantly further[]” the government’s important interests. . . .”<sup>112</sup> The Ninth  
11 Circuit also promotes heightened scrutiny with an “as-applied rather than facial” approach to  
12 avoid “broad constitutional judgments.”<sup>113</sup> The Supreme Court in *U.S. v. Virginia* dictates that a  
13 court considering “official classification based on gender” must “[f]ocus[ ] on the  
14 differential treatment or denial of opportunity for which relief is sought...[to] determine  
15 whether the proffered justification is ‘exceedingly persuasive.’”<sup>114</sup> It further clarifies that “[t]he  
16 burden of justification is demanding and it rests entirely on the State.”<sup>115</sup> “The justification  
17 must be genuine... [a]nd it must not rely on overbroad generalizations about the different  
18 talents, capacities, or preferences of males and females.”<sup>116</sup>

19 The government’s interest in this case is accuracy in identification of the passport bearer  
20 based on gender, which is undercut in multiple ways as explained *supra* (I)(A)(ii). While not

21 <sup>111</sup> 8 FAM 403.3-7; *see also* Motion at 14-15.

22 <sup>112</sup> *Karnoski*, 926 F.3d at 1202.

23 <sup>113</sup> *Id.*, 926 F.3d at 1200.

24 <sup>114</sup> *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)

<sup>115</sup> *Virginia*, 518 U.S. at 533.

<sup>116</sup> *Id.*

1 classifying male and female individuals referenced in *Virginia*,<sup>117</sup> the Policy has a different  
 2 evidentiary standard for verifying identity of a transgender person that warrants intermediate  
 3 scrutiny.

4 Here, the Secretary has not alleged an “exceedingly persuasive” interest in the Policy.  
 5 The Secretary does not allege any facts except overbroad generalizations about people who are  
 6 transgender needing medical certification to establish an accurate gender for a passport. The  
 7 Secretary does not establish that a gender marker is only accurate if certified by a doctor.  
 8 Therefore, the Secretary has not met the heightened burden required to allow different treatment  
 9 of a person who is transgender, specifically by requiring medical treatment, in obtaining a  
 10 passport.

## 11 II. THE SECRETARY VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

12 Under the APA, this Court can “hold unlawful and set aside agency action, findings, and  
 13 conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in  
 14 accordance with law.”<sup>118</sup> If an agency does not engage in reasoned decision-making by providing  
 15 an adequate evidentiary basis for its action and consider all important aspects of the decision  
 16 before it, the agency’s action is arbitrary and capricious. While the agency action is entitled to  
 17 some deference, if the agency “action is based upon a determination of law as to which the  
 18 reviewing authority of the courts does come into play, an order may not stand if the agency has  
 19 misconceived the law.”<sup>119</sup>

---

22 <sup>117</sup> *Id.* (addressing exclusion of women in “citizen-soldier training afforded by V[irginia]  
 23 M[ilitary] I[nstitute].”)

<sup>118</sup> 5 U.S.C. § 706(2)(A).

<sup>119</sup> *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)

1 In this case, if the Secretary has violated Oliver’s due process right to be free of forced  
 2 medical treatment, then the Secretary’s Policy violates the APA because it is contrary to law,<sup>120</sup>  
 3 and, if this Court does not find a Constitutional due process violation, then the Secretary’s Policy  
 4 remains arbitrary and capricious because of its use of outdated information.<sup>121</sup>

5 **A. The Secretary’s Policy Is Arbitrary and Capricious Because It Relies On**  
 6 **Outdated Information**

7 The Secretary’s Policy is arbitrary and capricious if the Policy does not “reflect the  
 8 current knowledge.”<sup>122</sup> Agency decisions resting on stale scientific data should be set aside as  
 9 arbitrary and capricious.<sup>123</sup> Courts are all the more likely to deem agency actions relying on  
 10 stale data arbitrary and capricious if, as is the case here, the agency has access to more current  
 11 and accurate data.<sup>124</sup>

12 As argued in its Motion, the Secretary has used a 2001 Standards of Care manual from  
 13 WPATH.<sup>125</sup> This is an outdated medical report from 2001 when WPATH was known as “The  
 14 Harry Benjamin International Gender Dysphoria Association” and the focus, as reflected in the  
 15 Secretary’s Policy, was gender dysphoria. WPATH changed its unfortunate name and issued  
 16 Version 7 of the Standards of Care in 2011, with a more appropriate view of the transgender  
 17

18 

---

<sup>120</sup> 5 U.S.C. § 706(2)(B).

19 <sup>121</sup> *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F.Supp.2d 1069, 1081 (E.D. Cal.  
 20 2004).

20 <sup>122</sup> *Rauenhorst v. U.S. DOT, FHA*, 95 F.3d 715, 723 (8<sup>th</sup> Cir. 1996).

21 <sup>123</sup> *Seattle Audobon Soc’y v. Espy*, 998 F.2d 699, 704 (9<sup>th</sup> Cir. 1993); *Desert Citizens of Am. V. Bisson*, 231 F.3d 1172, 1188 (9<sup>th</sup> Cir. 2000).

22 <sup>124</sup> *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 6-7 (D.C. Cir. 1986) (holding agency’s  
 23 action arbitrary and capricious for failure to consider an intervening study about inhumane  
 24 treatment of horses); *Golden Northwest Aluminum, Inc. v. Bonneville Power Adm’n*, 501 F.3d  
 1037, 1052 (9<sup>th</sup> Cir. 2007) (holding that an agency should have considered “changed market  
 conditions”).

<sup>125</sup> Motion at 4.

1 experience. This change coincides with DSM 5, which examines transgender and mental health  
2 in a more advanced and learned way.

3 The Secretary's Policy presumes that all transgender passport applicants have a sickness  
4 of mind or body because each applicant has gender dysphoria and needs a doctor's note. This  
5 presumption is at odds with the rapidly advancing understanding of the transgender population,  
6 viewing transgender as a normal process for some people and not as a pathology. The  
7 Secretary's reliance on a 2001 Version of the Standards of Care simply focuses on gender  
8 dysphoria and neglects the non-pathological transgender population. The Secretary does not  
9 take into account the rapidly advancing understanding of the transgender experience.

10 The Supreme Court has warned against reliance on outdated DSM or other scholarly  
11 treatises on psychiatry when "[t]he only certain thing that can be said about the present state of  
12 knowledge and therapy regarding mental disease is that science has not reached finality of  
13 judgment."<sup>126</sup> The ever-developing nature of psychiatric research warrants constant updating, as  
14 the Supreme Court suggests:

15 DSM-IV reflects a consensus about the classification and diagnosis of mental  
16 disorders derived at the time of its initial publication. New knowledge generated  
17 by research or clinical experience will undoubtedly lead to an increased  
18 understanding of the disorders included in DSM-IV, to the identification of new  
19 disorders, and to the removal of some disorders in future classifications. The text  
20 and criteria sets included in DSM-IV will require reconsideration in light of  
21 evolving new information.<sup>127</sup>

19 The Secretary's use of SOC 6 and its failure to update its understanding of transgender  
20 applicants creates an arbitrary and capricious doctor's note Policy.

21 **B. The Secretary's Policy Violated The Administrative Procedures Act Because It**  
22 **Was Contrary To Law**

---

23 <sup>126</sup> *Clark v. Arizona*, 548 U.S. 548 U.S. 735, 774 (2006) (quoting *Greenwood v. United States*,  
350 U.S. 366, 375 (1956)).

24 <sup>127</sup> *Id.*, 548 U.S. at 774 (citing DSM-IV at xxxiii).



1 The evaluation of whether the Secretary violated the APA because its decision was  
 2 contrary to law is described above at § I. As a result, if this Court finds the Secretary violated  
 3 the U.S. Constitution, the Secretary has also violated the APA. In this case, the Secretary  
 4 violated the Fifth Amendment Due Process Clause and Equal Protection Clause of the U.S.  
 5 Constitution and has not alleged a sufficient justification to support the discriminatory Policy.  
 6 Therefore, the Secretary violated the APA. Consequently, summary judgment should be granted  
 7 because there is no genuine issue of material fact and Oliver is entitled to judgment as a matter  
 8 of law.

### 9 CONCLUSION

10 The Secretary has not alleged a genuine issue of material fact or a sufficient legal  
 11 argument to refute that the Policy violates Oliver's right to be free from unreasonable medical  
 12 treatment, denies equal protection, and is arbitrary, capricious, and contrary to law. Therefore,  
 13 Oliver is entitled to summary judgment as a matter of law. For these reasons, this Court should  
 14 grant Oliver's request for Summary Judgment and/or Petition for Judicial Review.

15 DATED this 24<sup>th</sup> day of December, 2019.

16  
17  
18 /s/ David Olshan

19 CHRISTENA GEORGAS-BURNS, ESQ.

Nevada Bar No. 14314C

20 DAVID OLSHAN, ESQ.

Nevada Bar No. 4126

21 NEVADA LEGAL SERVICES, INC.

530 S. 6<sup>th</sup> Street

22 Las Vegas, Nevada 89101

Attorneys for Plaintiff

23 (702) 386-0404

[dolshan@nslaw.net](mailto:dolshan@nslaw.net)

Certificate of Service

I hereby certify on this 24<sup>th</sup> day of December, 2019, I served the foregoing Motion for Summary Judgment/Memorandum of Points and Authorities by sending it to a registered user by filing it with the court's electronic-filing system in accordance with Fed. R. Civ. P. 5(b)(2)(E) to the following:

JOSEPH H. HUNT  
Assistant Attorney General  
Civil Division

ANTHONY J. COPPOLINO  
Deputy Director

BENJAMIN T. TAKEMOTO  
(DC Bar # 1045253)  
Trial Attorney  
U.S. Department of Justice  
Attorneys for Defendant

/s/ David Olshan, Esq.  
David Olshan  
Nevada Bar No. 4126  
Nevada Legal Services, Inc.  
Attorney for Plaintiff